



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27627/2015

THE IMMIGRATION ACTS

Heard at Field House
On 1st September 2017

Decision & Reasons Promulgated
On 12th September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MUSAYYAB SHAHEEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Youssefian of Counsel, Richmond Chambers
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Khawar made following a hearing at Taylor House on 3rd November 2016.

Background

2. The appellant is a citizen of Pakistan born on 9th July 1989.
3. On 23rd July 2015 the Secretary of State refused his application for leave to remain in the UK as a Tier 4 (General) Student Migrant under the points-based system by reference to paragraph 322(2) of the Immigration Rules on the basis that in a previous application he had submitted false documents. In particular the respondent relied upon a false English language certificate (TOEIC test certificates) undertaken by the appellant on 5th December 2012 and 18th December 2012. The respondent maintained that the certificates were false documents because the appellant had used a proxy test sitter and did not personally achieve the English language scores recorded. He also refused the application because the appellant's CAS was invalid since the appellant's proposed college of study was not listed as a Tier 4 Sponsor as at the date of decision.
4. The judge recorded that the matter was listed as an oral hearing but the appellant did not attend. He noted that he had been properly served with notice of hearing which had been sent to his last known address on 30th July 2016 which had been returned to the Tribunal marked "Return to Sender No Longer at this Address".
5. The judge wrote as follows:

"The appellant has failed to communicate either with the respondent or the Tribunal any change of address and consequently must be deemed to be unlawfully at large. The court records show that the appellant's appeal was adjourned from 27th June 2016 when he did attend. On that occasion he sought an adjournment because of late service of new evidence by the Home Office Presenting Officer. Failure to communicate either with the respondent or the Tribunal change of address implicitly indicates a lack of intention on the part of the appellant to progress his appeal. Therefore I deem it appropriate to consider this appeal on the basis of the documentary evidence filed by both parties."
6. The judge then summarised the appellant's immigration history. So far as the issue of deception was concerned he said that the burden of proof in relation to dishonesty/deception allegedly deployed by the appellant in using a proxy test sitter was squarely on the respondent.
7. The respondent had served generic witness statements and further evidence in the form of an expert report from Professor Peter Finch. There was also a report entitled "Project Façade - Criminal Enquiry into Abuse of the TOEIC at Stanford College London" dated 15th May 2015 which reveals the very substantial extent of abuse prevalent at Stanford College, in that out of 1446 TOEIC speaking and writing tests, 843 were found to be invalid and 603 were found to be questionable. The appellant's speaking and writing tests fall into the invalid category. He was therefore satisfied that the respondent had established a prime facie case of deception and the burden of proof therefore essentially shifts to the appellant to provide some explanation.

8. He had failed to attend his appeal. He had provided a graduate diploma certificate in business administration but it was obtained in 2014, two years after the TOEIC test in 2012. His secondary school certificates, intermediate school certificates, international college certificate, IELTS certificate and ACCA exam transcripts all predate the tests, but the standard of English language attained by him cannot, the judge said, simply be assumed to be at the high standard required for higher studies.
9. The judge then wrote:

“It is also noteworthy that the appellant has now filed (in support of his appeal) a Pearson English Language Test undertaken on 28th May 2014. A comparison of the scores he achieved in this test in relation to listening, reading, speaking and writing reveals scores of the order of 54 to 58%, which are considerably lower than the scores he allegedly achieved in December 2012 (of the order of 90% plus) as evidence from the TOEIC test scores. What this in effect means is that two years after the event of allegedly having taken personally the TOEIC tests the appellant’s ability has diminished by approximately 50%. In my judgment this comparison of the Pearson test scores obtained in May 2014 with the TOEIC scores he allegedly achieved in 2012 also points to the inevitable conclusion that the appellant used a proxy test sitter in 2012.”
10. On that basis he dismissed the appeal.

The grounds of application.

11. The appellant sought permission to appeal on the grounds that the judge had erred in law because the notice of hearing was not served upon him. The Tribunal was aware that it had been returned. The judge assumed that the appellant had moved address and not notified the Tribunal and had intended to take no part in the proceedings which were both erroneous. He had not moved and he did intend to take part. The question was not whether the judge was at fault but rather whether his proceeding in these circumstances had resulted in unfairness. It was argued that the judge was wrong in law in upholding the Secretary of State’s submission that the appellant had employed deception based on the witness statements.
12. Permission to appeal was refused by Judge Kelly on 16th May 2017.
13. The appellant then made a further application to the Upper Tribunal and was granted permission on 12th July 2017 by Upper Tribunal Judge McWilliam.

Submissions

14. Mr Youssefian relied on his grounds. He said that the appellant had produced an email address when he had filled in his appeal papers online, and could also produce evidence that he had not in fact moved, and he had no explanation as to why the hearing notice had been returned.

15. He submitted that the judge had not properly applied Rule 28 of the Procedure Rules which required him to consider whether it was in the interests of justice to proceed. He accepted that it was the normal procedure of the Tribunal to serve the notice of hearing by post but, it having been returned, there was an obligation on the Tribunal to consider whether further steps should be taken to notify the appellant of the hearing. His email address was available. He had attended a previous hearing. It would therefore have been clear to the Tribunal that he intended to take part in the appeal process. This was a litigant in person and the seriousness of a finding of deception against him would have catastrophic consequences for him in the future. He had been deprived of his right to a fair hearing since he had not been able to advance his case.
16. Furthermore the judge had failed to make any reference to the ETS look up tool referring to the appellant. The evidence which he was relying on was truly generic.
17. Mr Melvin defended the determination. It was not for the Tribunal to chase the appellant up by email or telephone providing the notice of hearing had been properly served. It was clear that the judge had looked at all to the evidence holistically and come to a conclusion which was open to him.

Findings and Conclusions

18. There is in the file an envelope clearly marked "No Longer at this Address Return to Sender" with the return address HMCTS, PO Box 7866, Loughborough, UK. It contained the hearing notice which is addressed to the appellant's last known address and where he maintains that he has resided at all relevant times.
19. The fact that the Tribunal may also have had on file an email address for the appellant by no means establishes that the judge erred in law in proceeding to determine the appeal in the appellant's absence on the basis that he had been properly served with notice, in accordance with the Procedure Rules. The document was clearly sent by post to his address.
20. Whilst it would have been open to the judge to seek to make further enquiry he had no obligation to do so. There was no mobile telephone number on the file. Trawling through the papers in order to discover whether there was an email address is well beyond what could have been reasonably expected of the judge.
21. Neither was there any obligation upon him to set out in terms that he had considered whether the interests of justice required him to proceed in the appellant's absence. He did not use that phrase in terms, but he did take into account all relevant factors at paragraph 7 of the determination including the fact that the appellant had attended on a previous occasion.
22. On the evidence before him he was plainly entitled to conclude that the appellant had failed to communicate a change of address and to infer from the return of the hearing notice that he had little interest in pursuing his appeal. There were clear

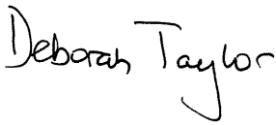
public interest considerations in proceeding, not least the waste of money to the taxpayer caused by unnecessary adjournments.

23. It cannot properly be said that there was any procedural impropriety in this case.
24. So far as the merits are concerned Mr Youseffian initially submitted that the ETS look up tool was missing from the documents but when Mr Melvin pointed out that it was there simply maintained that the judge had not referred to it. The judge was not obliged to refer to each and every document. The data was in the papers before him and clearly records the appellant's test results as being invalid.
25. Moreover the judge makes the entirely reasonable point that the appellant himself produced evidence showing that his recent test scores were well below those obtained in the disputed 2012 ones, which suggests that the tests he took two years earlier were not taken by him.

Notice of Decision

The original judge did not err in law. The decision stands. The appellant's appeal is dismissed.

No anonymity direction is made.



Signed

Date 11 September 2017

Deputy Upper Tribunal Judge Taylor